



POLICE DEPARTMENT

September 24, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Daniel Mirabile
Tax Registry No. 942214
109 Precinct
Disciplinary Case No. 2010-2906

The above-named member of the Department appeared before me on August 23, 2012, charged with the following:

1. Said Police Officer Daniel Mirabile, while assigned to the 109th Precinct, on or about January 12, 2010, while on duty, did fail to fulfill his duties and responsibilities as a police officer, to wit: said Police Officer failed to conduct a field investigation upon responding to a complaint of harassment.

P.G. 207-07, Page 1, Paragraph 2 – PRELIMINARY INVESTIGATION OF OF COMPLAINTS (OTHER THAN VICE RELATED OR NARCOTICS COMPLAINTS)

2. Said Police Officer Daniel Mirabile, while assigned to the 109th Precinct, on or about January 12, 2010, while on duty, did fail to fulfill his duties and responsibilities as a police officer, to wit: said Police Officer failed to prepare a Complaint Report upon responding to a complaint.

P.G. 207-07, Page 1, Paragraph 3 – PRELIMINARY INVESTIGATION OF COMPLAINTS

3. Said Police Officer Daniel Mirabile, while assigned to the 109th Precinct, on or about January 12, 2010, while on duty, did fail to fulfill his duties and responsibilities as a police officer, to wit: said Police Officer failed to monitor his Department radio.

P.G. 202-21, Page 1, Paragraph 19 POLICE OFFICER, DUTIES AND RESPONSIBILITIES

4. Said Police Officer Daniel Mirabile, while assigned to the 109th Precinct, on or about January 12, 2010, while on duty, did fail to notify radio dispatch of the final disposition of a response to a radio run and of the results of a canvass performed in response to a radio run.

P.G. 206-03, Page 2, Paragraph 4 REVISION TO PATROL GUIDE 206-03,
VIOLATIONS SUBJECT TO COMMAND
DISCIPLINE

5. Said Police Officer Daniel Mirabile, while assigned to the 109th Precinct, on or about January 12, 2010, while on duty, did fail to maintain his Department issued activity log.

P.G. 202 21, Page 1, Paragraph 17 – POLICE OFFICER, DUTIES AND
RESPONSIBILITES

The Department was represented by Mark Berger, Esq., Department Advocate's Office, and Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Guilty to the subject charges and testified in mitigation of the penalty. A stenographic transcript of the mitigation record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent, having pleaded Guilty, is found Guilty as charged.

INTRODUCTION

On January 26, 2010, Person A was murdered at her residence in the confines of the 109 Precinct. The following day, Person B was arrested for the crime. The instant charges originate from an investigation conducted by the Internal Affairs Bureau (IAB) into the Department's response to Person A's requests for service concerning Person B in the days before her death. Respondent handled one such call on January 12, 2010.

SUMMARY OF EVIDENCE IN MITIGATION

Respondent has been a police officer for six years. He did field training in the 115 Precinct Impact Zone and has been at the 109 Precinct for five years. He has been assigned to patrol on the midnight tour for the last two years. Before that, he worked in the 109 Precinct Conditions Unit, where he addressed general conditions in the area and the concerns of storeowners. Respondent estimated that he has made 70 or 80 arrests in his career.

On January 12, 2010, Respondent worked a 0930 by 1805 tour and was assigned to Post 1, which was a downtown, conditions foot post. The assignment entailed general enforcement, being visible and addressing concerns that arose. Respondent testified that he was handling a job when he heard a call on the Department radio concerning a complainant and a “perp in the past” and he noted that the location of the call was right around the corner. He also heard that the job was assigned to the patrol car covering “Sector Mike” which was “up on the other end of the precinct.”

Explaining how he came to be assigned the job, Respondent stated, “It was my own volunteer to do because a sector in the north would have taken a decent amount of time to get there and I was right around the corner. Why make them come all the way down and take them off of whatever assignment. I figured why not just go over. I am right there.” He left other officers at the job he had been handling and started to walk to the location of the call, asking the radio dispatcher to repeat the transmission and provide any additional information. Respondent explained that he did not hear the first transmission of this job because he had been working on the previous job. He said the

repeat transmission was a “10-68,” see complainant, regarding a “perp in the past from a past assault.”

Respondent testified that he was working by himself at the time. He recalled the location as being a three-story commercial building surrounded by other commercial establishments along the whole road. It took him a matter minutes to get to the location and on the way he looked around for anything suspicious. He checked to see if there was anything out of the ordinary, to see if anyone was running or exhibiting any other abnormal behavior. He did not see any such thing.

When he got to the location, Respondent realized that the complainant, Person A, did not speak English and he requested a Mandarin interpreter. While awaiting Police Officer [Ming] Zhang, who spoke Mandarin, Person A showed Respondent several expired orders of protection. He reviewed them and determined that they were, in fact, expired. He believed the last one had expired a few months earlier.

When Zhang arrived and translated, Respondent was told that the individual in question (later learned to be Person B), had “pretty much poked his head in, looked around, left, and said nothing to her [Person A], and then proceeded to leave the location. There was nothing said, nothing done, and that was pretty much all the action that had happened.”

Respondent further testified that “there really wasn’t much conveyance of any fear of any sort. Just she wanted to know why he was at the location.” He did not learn why the previous orders had been issued.

Explaining why he did not prepare a Complaint Report, Respondent stated:

I did not feel that it constituted a Complaint Report because I really did not feel at that time that there was really an offense committed with all information considered that I was given. I made the best determinations to advise her to

reinstate the orders of protection, go down to the courts, and that he was in a public place, it looked like it was an employment agency of some sort or some other type of business which was a public place, so he was able to be there with no order of protection in effect. And with that information, I did not feel it was necessary.

Respondent testified that he was subsequently interviewed by IAB who advised him that, given the orders of protection and the fact that the subject of those orders had returned to the premises, he should have prepared a Complaint Report for Harassment. Respondent noted that such a report would have been “closed out to patrol, mean[ing] it gets entered into the system, gets a number and that’s it.” However, if the order of protection had been active, the matter would have been forwarded to the detective squad for further action. Respondent stated that he would now know to prepare a Complaint Report on something like this in the future.

Respondent testified that when he left Person A, he continued to look for the subject individual. He walked over to a local park and looked to see if there was anyone loitering there but he saw nothing. He did not enter these things in his memo book because he did not believe they were pertinent. He indicated that was the type of thing he would have done even if he were not canvassing for a specific individual. He recalled putting down the time and disposition of the job in his memo book.

Respondent testified that he has learned that it would behoove him to take a Complaint Report in this type of situation and to try to get all of the information correctly annotated in his memo book. He noted that since his official Department interview on March 18, 2010, he has changed the way he does things.

On cross-examination, Respondent agreed that he had volunteered for the job and that he had been given limited information. He had not heard a description with more detail than was broadcasted initially. En route to the location, he looked around to see if anyone suspicious was in the area; he found no one loitering in the stairway. He agreed that with the limited information he had, it would be difficult to know exactly what to look for. When he arrived at the location of the job, he believed it was a business. Person A did not speak English; she spoke Mandarin and Respondent required an interpreter, Zhang, who did not arrive right away. He agreed that while he was waiting for Zhang he did not call the radio dispatcher again to get more information.

Zhang interpreted for Respondent but Zhang did not participate in the investigation. Respondent agreed that he trusted that Zhang, a member of the service, provided an accurate translation. Respondent learned that the man who appeared at Person A's residence had assaulted her in the past and that he was just released from jail. He did not recall her providing details of the assault. She showed him orders of protection which were expired, and, in his mind, these could not be used against the man. He did not recall the reason the orders of protection were issued.

Respondent agreed that, when interviewing a person, it was important to determine if she was in fear for her safety or her life. He agreed that while speaking with Person A he was trying to see if he could find something to justify writing a Complaint Report. He did not recall if he asked Person A if she feared for her safety but he believed he did, based on his practice. He agreed that he did not call for a supervisor.

Respondent agreed that he did not get a lot of information from Person A. He did get a description and conducted a canvass after speaking with her. He did not notify the radio

dispatcher about the results of his canvass. He did not make a memo book entry about the canvass, nor did he note the presence of an interpreter in his memo book. He did not write either Person A or Person B's names in his memo book, which only contained the address and final disposition of the job.

On re-direct examination, Respondent noted that had he prepared a Complaint Report, it would have been done at the scene, and that it would have taken a few minutes to for him to prepare it.

ANALYSIS OF FACTS

The facts of this case are basically not in dispute. To best understand this case and make an appropriate determination of the penalty, I have set forth the relevant facts in chronological order.

On January 12, 2010, Person A called 911. According to the IAB Investigating Officer's Report [Respondent's Exhibit (RX) B, dated March 22, 2010], Person A related the following to the 911 operator through an interpreter:

Three years ago someone robbed me, I reported to police, he was arrested, in jail for three (3) years, he was released from his sentence and he came back again. He's right outside now at the door (of her residence, 135-32 40th Road, Apt. 3F). When asked, the C/V reported the suspect was Chinese Mandarin, Chinese, wearing yellow jacket knitted cap black and white, blue jeans. She did not see a weapon, she did not pay attention, she saw him and locked her door. She reported that the suspect was right outside her apt. unit 3F, right outside the door [...] C/V added "I'm shivering all over, please ask the police to come as soon as possible. Three (3) years ago he tried to strangle me with a rope.

The report then indicates that the above information was transmitted to the radio dispatcher, who relayed the following messages to patrol:

First transmission: See complainant (10-68) at 135-32 40th Road.

Second transmission: 109 - perp from the past 135-32 40 Road (past assault).

Third transmission: 109 [Sector] M Respond to perp from past, 3F 3rd floor, perp [in front of] house. [The radio dispatcher gives the description mentioned above and advised 109 Sector M that the perp was wanted for a past assault.]

Fourth transmission: [This transmission occurred in response to a request for information about the job from Post 1, Respondent.]
109 Post 1, 135-32 40th Road, Prince to Main, perp from the past, something that occurred 3 years ago, says she sees the perp.

It should be noted that this report differs from what was represented by the Advocate. In his opening remarks, the Advocate asserted that during the first transmission the radio dispatcher recounted the full details of what Person A told the 911 operator. As can be seen, according to the summary above, while the 911 operator provided the radio dispatcher with all of the information, none of the radio dispatcher's transmissions to patrol contained all of that information. The second and third transmissions cite a perp wanted for a past assault. In the repeat transmission requested by Respondent, only a "perp from the past, something that occurred 3 years ago" was reported by the radio dispatcher (see Fourth Transmission, above).

These transmissions tend to confirm Respondent's testimony about this portion of the incident. Respondent testified that he was on a foot post and was handling another job when he heard the transmission. He realized that the job was being given to the

patrol car assigned to Sector M, which was on the other side of the precinct. As he was a block away, he notified the radio dispatcher that he would take the job.

Respondent gave unchallenged testimony that he went to the location and while travelling there on foot he canvassed for a suspicious person, (here again, according to the investigator's report, the radio dispatcher does not appear, in any transmission, to have given a description). Upon arriving at the location, which he believed to be a commercial building and not a residence, he met Person A. Unable to communicate with her, he requested an interpreter. Zhang arrived and Person A was interviewed. She told him that the perpetrator had poked his head in the door and left. She showed him three orders of protection, all of which were expired.

Respondent testified that he did not believe the conduct Person A described amounted to a crime or a violation and, as a result, he did not believe the preparation of a Complaint Report was appropriate. He advised her as to how she might get an order of protection and left. As he left, he continued to look for the perpetrator.

Respondent acknowledged that he did not file a Complaint Report. Respondent made a memo book entry but he acknowledged that his memo book entry was inadequate as it did not list Person A's name, the substance of what occurred or the fact that an interpreter was called to the scene.

According to another IAB Investigating Officer's Report (RX A, dated March 2, 2010), on Friday, January 22, 2010, Person A went to the 109 Precinct to report that on Monday, January 18, 2010, she had been approached and threatened by Person B. According

to the Investigating Officer's Report, a Complaint Report was properly put in the system for Harassment in the Second Degree (a violation but not a crime).¹

On Tuesday, January 26, 2010, Person A was murdered in her home. On January 27, 2010, Person B was arrested for the murder of Person A.

Obviously, a great tragedy occurred in this case. Obviously, there is great concern that this Department could have done more to prevent that tragedy. This case does not address that global issue. It is limited to addressing the failing Respondent has admitted to in regard to his portion of this situation. On the other hand, while the Department has not alleged that Respondent bore responsibility for the tragic outcome, it has suggested that, had the Respondent done more, it might have been prevented. Thus that issue must, in some measure, be addressed.

As noted previously, in this case, Respondent has pled guilty to all of the specifications and the only issue is an appropriate level of punishment. In assessing that level of punishment, it is necessary to see what level of misconduct is involved in the various failings admitted to.

Chronologically, the first specification to deal with then is Specification No. 3 which alleges that Respondent failed to monitor the Department radio. The Advocate explained that this specification involved two separate failures, first his failure to listen to the initial radio transmission. According to the Advocate there is a second part of this specification which occurred at the end of the incident and will be discussed later.

The first part of this specification, to which Respondent has pled guilty, is a bit of a mystery. Respondent gave unchallenged testimony that at the time the call first came

¹ Respondent was apparently not involved in the events of January 22, 2010 and it is included herein to provide context for the entire incident.

over the radio, he was engaged in handling an earlier job. He had heard enough of the transmission to discern that he was near the location and that the sector that had been assigned the job, Sector M, was at the opposite end of the precinct. Anyone who listens to the Department radio knows that officers frequently ask the radio dispatcher to repeat a transmission because they did not hear it in its entirety, and that often involves sector cars with two officers monitoring the radio. Respondent was in the street handling a job while monitoring his own radio. However, as Respondent has pled guilty to this charge, these facts need to be considered on the issue of mitigation.

The second specification to deal with chronologically is Specification No. 1, which alleges that Respondent failed to conduct a “field investigation.” It was not made clear in the record what the specific nature of this failure was but, again, Respondent has pled guilty. It should be noted, however, that Respondent testified that he looked for a suspicious person on his way to the job and after leaving the job. Even the Advocate in his questioning of Respondent referred to this as a canvass and indeed the charges themselves refer to Respondent as having conducted a “canvass” (see Specification No. 4 which alleges that Respondent failed to report the result of a “canvass” he “performed”).

So while Respondent has acknowledged that he failed to conduct a “field investigation,” he did take some action that should be considered in mitigation.

The next specification to deal with chronologically would be Specification No. 2. This specification alleges that Respondent failed to file a Complaint Report.

Here, again, Respondent has pled guilty in that he accepts the correctional instructions given to him after his official Department interview that he should have filed a Complaint Report for Harassment in the Second Degree under Penal Law § 240.26.

Again, in order to determine an appropriate penalty we must measure how significant the misconduct or misjudgment was.

Penal Law § 240.26 subdivision 3, which Respondent was told would apply to the circumstances described to him on January 12, 2010, provides that “A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person he or she engages in a *course of conduct or repeatedly* commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose” (emphasis added).

On January 12, 2010, as far as we know, there were no other prior actions of Person B except those that had occurred years earlier. Respondent testified that during his interview with Person A he went over in his mind the provisions of the Penal Law to determine if there was some crime or violation that had been committed so that he could file a report but found none. Frankly, as a matter of law, it would appear that Respondent was correct in his legal assessment. Penal Law § 240.26 clearly calls for more than one act.² Under the circumstances, this needs to be considered as a mitigating factor.

The next events chronologically relate to Specification No. 4 and the second part of Specification No. 3. There was no real testimony or evidence offered in regard to these matters but it would appear that, as per Specification No. 4, Respondent failed to notify the radio dispatcher of the final disposition of the job and that, with regard to the

² Far more troubling to this writer is a much more serious offense may have been committed by Person B on January 12, 2010 and January 18, 2010, that appears not to have been explored by anyone who handled or reviewed this case. There is some evidence that Person A told everyone who interviewed her that Person B had gone to prison based on her complaint. It is quite possible that Person B had been released on parole or post-release supervision. If that were the case, there would have been a basis for reporting him to parole and getting a parole warrant. This is not to say that a check of Person B’s parole status was not done (his name would have been available from the expired orders of protection Person A presented) but simply that it is not mentioned in any of the reports presented in this case or in the representation of the Advocate.

second portion of Specification No. 3, Respondent had to be called repeatedly after he completed the job to find out how it was to be categorized. Again, measuring the level of misconduct here, it would seem that this is the type of event that would ordinarily be handled with corrective instructions or, at the most, command-level discipline.

As to Specification No. 5, there is no question that Respondent made entries in his Activity Log about the fact that he responded to the location but the entries failed to contain any substantive material about the job, such as the name of the complainant, the nature of the complaint, or the fact that an interpreter was used. Again, in assessing the scope of the misconduct this is not a case where no entry was made but the entry that was made was inadequate.

There are other factors which reasonably could be considered on the issue of mitigation. The first is that Respondent acted proactively and professionally in responding to this radio run. He was not specifically called but heard enough of the radio transmission to realize that the location was near his foot post and that the unit that had been called to respond was at the opposite end of the precinct. He volunteered to take the job, on foot and alone.

The other mitigating factor is that the radio dispatcher failed to provide him with all of the information about Person A's 911 call. It has been noted that, according to the Advocate, the first transmission by the radio dispatcher contained more dire information about Person A's call than the transmission that followed Respondent's request for information concerning the job. As noted previously, it is not unusual for officers to ask the radio dispatcher to repeat information. Respondent should not be penalized for the failure of the radio dispatcher in this regard. The Investigating Officer's Report (RX B) noted that:

The review determined that the 911 dispatcher(s) involved did not accurately transmit to units of the 109 Precinct the call for assistance as reported by the C/V and to 911 operator. By the time 109 Post 1 [Respondent] took the job, he was provided with very little information about the incident.

The last issue that needs to be discussed is the notion that if Respondent had done more, the ultimate tragedy could have been prevented. While Respondent was not charged with this, there is no question that this is something that the Advocate implied. Of course, we can never know what might have been but there are some facts which might shed some light on this.

Respondent was faulted for failing to file a Complaint Report. He was told that he should have filed a Complaint Report for Harassment in the Second Degree. This offense is a violation and not a crime. A police officer cannot make an arrest for a non-criminal offense that the officer does not witness, therefore no arrest could have been made for a Penal Law offense based on Person A's complaint. It was uncontested that Complaint Reports for violations do not go to the detective squad for further investigation and are closed out in patrol.

Thus, the filing of a Complaint Report for Harassment in the Second Degree would likely have had little impact on the ultimate outcome of this unfortunate situation. While this might seem to be a matter of speculation, that conclusion is, in fact, supported by other events. On January 22, 2010, Person A walked into the precinct and lodged a similar complaint. After a review in the precinct, a Complaint Report for Harassment in the Second Degree was filed. It apparently did not prompt an investigation, which is to be expected, and it had no impact on the ultimate tragedy. It should be noted that

Respondent, as far as can be determined, had nothing to do with the January 22, 2010, event.

In the Investigating Officer's Report (RX A), an extensive examination was done to see if the officers who took that report failed to list a more serious crime in the Complaint Report and thus trigger action by the detective squad. After conferring with the Legal Bureau it was agreed that no crime was alleged by Person A and that the highest charge was the violation.³

Of course, we cannot know what might have happened. It would appear that filing a Complaint Report for Harassment in the Second Degree by Respondent would have had little practical effect on the ultimate and tragic outcome. As noted in an earlier footnote, it is puzzling as to why apparently no consideration was given by anyone to the possibility that Person B was on some kind of parole or post release supervision. Triggering a violation of that sort would have provided a basis for an immediate arrest but the materials before this Court do not provide sufficient information to see if that kind of a check was done at any time. Additionally, there is no indication that anyone thought of running a warrant check on Person B, something that might have provided a basis for an immediate arrest.

In any event, it would be unfair to penalize Respondent for failing to find something (if it existed) that no one else seems to have pursued and for which he is not charged.

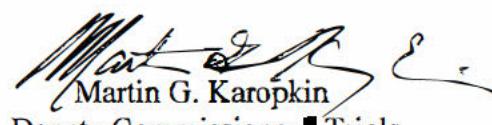
³ In the portion of the report (RX A) that deals with this it was noted that in the crimes of Harassment in the First Degree and Stalking the term **repeatedly** is defined as **day after day** (emphasis as in original). It further noted that the general rule of the District Attorney is three or more acts committed within two years.

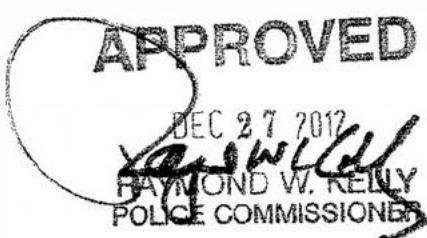
PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on July 10, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department has recommended that Respondent be penalized with the loss of 30 vacation days. Respondent, through his counsel, has suggested that a penalty of 15 days is more appropriate. In the previous section of this report I have reviewed extensively the mitigating factors involved in this case. Additionally, it should be noted that Respondent appeared to be genuinely contrite and determined to do a more thorough job in the future. Considering the totality of Respondent's actions I recommend a penalty of the loss of 15 vacation days.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner Trials

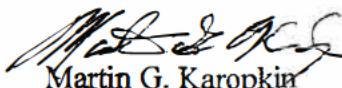


POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DANIEL MIRABILE
TAX REGISTRY NO. 942214
DISCIPLINARY CASE NO. 2906/10

In 2011, Respondent received an overall rating of 3.0 "Competent" on his annual performance evaluation. He was rated 4.0 "Highly Competent" in 2009 and 3.5 "Highly Competent/Competent" in 2010. [REDACTED] Respondent has no prior formal disciplinary record.

For your consideration.



Martin G. Karopkin
Deputy Commissioner Trials